Supreme Court, U.S.
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No. 10- 101065 FEB 24 2011

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Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,
Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this damage action under the Packers and Stockyards Act ("PSA"), a judgment of $14,551,935 was entered in favor of a class of contract poultry growers (the Respondents here) and against a poultry processor (Petitioners here) whose chicks they raised to market-ready birds. Respondents claimed that they sold their services under a condition of monopsony, and that Petitioners' control over the number of birds they were given and the prices they were paid so reduced total market supply that consumer prices were raised. Throughout the relevant period, Petitioners held only a 2% share of the market for chicken sold in the United States, but over that period their production of chicken increased by 65%, total output of chicken in the United States increased by nearly one-third, and the prices consumers paid for chicken fell in both nominal and real terms.

1. Whether a live poultry dealer controlling 2% of domestic supply, sold by competitive bid, can be proved to have injured output-market competition with a truncated competitive effects analysis of its vertical arrangements, simply because it holds a lawful monopsony where it purchases inputs?

2. Whether the PSA's prohibition of any "unfair practice" by "live poultry dealers with respect to live poultry" permits a judgment against a "live poultry dealer" for restricting output when the dealer distributed every chick that it hatched for ultimate production to the market?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership were the appellants below and are the petitioners in this Court. O.K. Industries, Inc. is a privately held corporation and is the parent corporation of O.K. Foods, Inc. and O.K. Farms, Inc. Petitioners O.K. Foods, Inc. and O.K. Farms, Inc. are wholly-owned subsidiaries of petitioner O.K. Industries, Inc. Petitioner O.K. Broiler Farms Limited Partnership is a privately held Arkansas limited partnership. No publicly held company owns 10% or more of the stock of O.K. Industries, Inc., O.K. Foods, Inc., or O.K. Farms, Inc., and no publicly held company owns 10% or more of the units of petitioner O.K. Broiler Farms Limited Partnership.

Charles Been, Don Frost, Robert Fields, Eugene Johnson, and Eugene Blackwell, individually and on behalf of others similarly situated, are individuals and were the appellees below. They are the respondents in this Court.

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IN THE

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O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,

Petitioners,

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CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

O.K. Industries, Inc., O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Broiler Farms Limited Partnership (collectively "O.K.") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2010 WL 3995981 (10th Cir. Oct. 13, 2010) ("*Been II*") and reproduced in the Appendix ("App.") at 1a.

The November 26, 2010 order of the Court of Appeals denying O.K.'s petition for rehearing and rehearing *en banc* is unreported and is reproduced at App. 100a. A prior opinion of the Court of Appeals in this matter is reported at 495 F.3d 1217 (10th Cir. 2007) ("*Been I*") and is reproduced at App. 34a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for judgment as a matter of law is unreported and is reproduced at App. 80a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for new trial is reported at 2008 WL 2704470 (E.D. Okla. July 3, 2008), and is reproduced at App. 86a. The decision of the United States District Court for the Eastern District of Oklahoma denying O.K.'s motion for summary judgment is not reported and is reproduced at App. 91a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 2010. App 1a. Petitioner timely filed a petition for rehearing or rehearing en banc, which the Court of Appeals denied on November 26, 2010. App. 100a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title I, Section 2(a) of the Packers and Stockyards Act, 7 U.S.C. § 182, reads in pertinent part:

> When used in this chapter—
>
> * * * *
>
> (6) The term "poultry" means chickens, turkeys, ducks, geese, and other domestic fowl;
>
> * * * *

(8) The term "poultry grower" means any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or another, but not an employee of the owner of such poultry;

(9) The term "poultry growing arrangement" means any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for slaughter;

(10) The term "live poultry dealer" means any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce;

* * * *

Section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192, provides in pertinent part:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry to:

(a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;

* * * *

INTRODUCTION

Petitioners ("O.K.") ask the Court to resolve conflicts among the circuits with respect to recurring questions of national importance in cases requiring proof of injury to competition. In *California Dental Association v. FTC*, 526 U.S. 756 (1999), this Court held that truncated competitive effects analysis to prove injury to competition under Section 1 of the Sherman Act, 15 U.S.C. § 1, is appropriate only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," noting the application of such analysis to horizontal agreements and combinations previously reviewed by this Court. *Id.* at 770.

While this case arises under Section 202(a) of the Packers & Stockyards Act ("PSA"), 7 U.S.C. § 192(a), rather than the Sherman Act, that principle is applicable. Section 202(a) of PSA, which prohibits certain "unfair practices" in the meat and poultry industries, has consistently been construed to require a showing that the challenged conduct injures competition. In this case, O.K. sells its chicken in a nationwide market by competitive bid, and has but a 2% share of that market. In addition, during the relevant period of this litigation, its total output of chicken has increased by 65%, while nationally, production increased by about a third. Notwithstanding O.K.'s minimal market share and expanding production, the Tenth Circuit held that Respondents

were entitled to rely on the truncated competitive effects analysis that this Court adopted in *Indiana Federation of Dentists v. FTC*, 476 U.S. 447 (1986), because their expert opined statistically that O.K.'s internal production decisions affected national and immediate resale prices.

O.K. is a vertically-integrated poultry company that owns hatcheries, feed mills, and processing plants. It contracts with independent farmers, "growers," to raise chicks to market-ready weight with chicks, feed, and medicine supplied without cost, in return for payment at the end of the grow out. O.K. determines the number of chicks to be distributed to each grower, and when each grower receives a new flock. While these decisions are internal to O.K., and thus represent unilateral conduct, they are permitted by the growing contracts that O.K. enters into with farmers, such as Respondents. Because growers do not compete with O.K., such contracts are, in antitrust parlance, vertical arrangements. Under the Sherman Act, the competitive effects of vertical arrangements are analyzed under the full Rule of Reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In cases challenging vertical conduct, the circuit courts have consistently held that proof of injury to competition requires a threshold showing that the defendant wields power in the relevant output market. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 419 n.5 (5th Cir 2010), *cert. denied,* 2011 WL 588420 (U.S., Feb. 22, 2011); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761 (7th Cir. 1996); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 17 (1984). Ordinary competition law principles deem a 2% share

insufficient to force buyers into uneconomic bargains. *See, e.g., Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 26-27 (1984) (30% market share insufficient as a matter of law to raise an inference of market power in a vertical contract restricting anesthesiology services supplied at a hospital); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986) (Bork, J.) (5-6% market share insufficient as matter of law to support market power in a horizontal arrangement among a van line's independent carrying agents), *cert. denied*, 479 U.S. 1033 (1987). The rule of law adopted by the Tenth Circuit in this case cannot be squared with this approach.

The Tenth Circuit's decision conflicts with those of other circuits in two respects. First, the decision conflicts with the Seventh Circuit's decision in *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004). The Seventh Circuit held that *Indiana Federation*'s truncated competitive effects analysis does not apply to vertical restraints, and would only apply where plaintiff proves: (i) the rough contours of a relevant market; and (ii) the defendant commanded "a substantial share of the market." *Id.* at 737. The Tenth Circuit jettisoned any reliance on output market share because O.K. is the only purchaser of poultry growing services in a small area of eastern Oklahoma, and therefore, in the court's view, a "monopsonist." Yet even accepting that characterization, it is well-understood by scholars by that alleged monopsonists, such as O.K., that sell their output in competitive markets cannot raise prices above the competitive level. IIB Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 575, at 402-03 (3d Ed. 2007). Thus, the Tenth Circuit's holding doubly conflicts with

Republic Tobacco: it permits alleged evidence of actual anticompetitive effects to prove injury to competition arising from a vertical restraint, and does so in a case where defendant's market share is very low. *Union Carbide Corp. v. Montell, N.V.*, 27 F. Supp. 2d 414, 418 (S.D.N.Y. 1998), reviewed the literature finding no instance where actual adverse effects existed in the absence of high market shares *and* conduct bordering on illegality.

Second, the Tenth Circuit's ruling directly conflicts with several decisions of the other circuits holding that a truncated competitive effects analysis must yield to a more searching market analysis when a defendant offers plausible competitive benefits for its challenged practice. *See, e.g.*, *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir.), *cert. denied*, 131 S. Ct. 658 (2010). Here, the record evidence established without dispute that: (i) O.K.'s aggregate chicken production increased 65% over ten years while total market output rose by more than 30%; (ii) the number of farmers from whom O.K. purchased growing services increased; (iii) each grower's individual production increased; and (iv) prices paid to farmers for growing services rose faster than inflation while both real and nominal consumer prices for chicken declined. Yet the Tenth Circuit brushed aside these facts and held that truncated competitive effects analysis of competitive injury is appropriate even when there is ample evidence in the record of procompetitive benefits resulting from the challenged conduct. As explained below, that holding cannot be squared with those of several other circuits.

If permitted to stand, this conflict will not only apply different legal rules to identical conduct depending on the chosen venue, but also will create severe dislocations in all industries subject to the PSA. It is not uncommon for a poultry dealer, such as O.K. to be the only chicken processing company in a given area. James M. MacDonald, *The Economic Organization of U.S. Broiler Production,* at 13, Econ. Info. Bull. No. 38, Econ. Res. Serv. U.S. Dep't. of Agric. (June 2008) http://www.ers.usda.gov/Publications/EIB38/EIB38.pdf. (24% of growers report having only one purchaser in their area). It is relatively easy for growers to portray poultry dealers as monopsonists and, under the Tenth Circuit's rule, subject their internal production decisions to second-guessing by judges and juries. This Court has cautioned against competition law rules that threaten to turn courts into "central planners, identifying the proper price, quantity, and other terms of dealing." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 408 (2004). The decision below, however, does just that. The Court should grant the petition for certiorari and resolve this conflict.

STATEMENT OF THE CASE

1. O.K. Has Substantially Increased Chicken Output to the Benefit of Consumers. O.K. is a vertically-integrated poultry company that owns breeding stock, hatcheries, feed mills, and processing plants along the Arkansas-Oklahoma border. It contracts with independent farmers, known as growers, to raise chicks to maturity under a poultry growing arrangement. These contracts require O.K. to supply chicks, feed, and medicine to growers at no cost, delivering these items directly to growers' farms. O.K. has contract growers in Arkansas whose

farms are located close to three competing processing plants, two owned by Tyson Foods in Waldron and Clarksville, and one by Wayne Farms in Danville, Arkansas. O.K.'s Arkansas growers can generally choose among two or more buyers for their services.

O.K.'s growers in Oklahoma, however, are too far from the nearest competing plant to contract with it, and therefore only one of O.K.'s competitors (Tyson) has even a handful of Oklahoma farmers, just inside the state line. For approximately 270 growing farms in Oklahoma, O.K. is the only purchaser for their services.

Respondents are growers for O.K. in Oklahoma. While labeling O.K. a "monopsony" purchaser of growing services in their region, Respondents have conceded that O.K. has done nothing "nefarious" to attain its "monopsony" with respect to Oklahoma farms. Despite its supposedly favored position in Oklahoma, O.K. offers the same growing contracts containing the same terms to growers in Oklahoma and in Arkansas. Respondents have never contended that O.K. provided more birds or higher payments to Arkansas growers.

A grower must build and equip at least two houses suitable for raising chickens, which, in 2001, just prior to suit, cost approximately $160,000 each. The magnitude of the investment that O.K. makes with a two-house farm is reciprocally considerable. A two-house flock of 48,000 chicks (valued at $0.15 per chick in the parties' contract), grown to 6.75 pounds each on average, and requiring 2.1 pounds of feed (at $0.09 per pound per the contract valuation) to produce a pound of final weight will, across 5.5 flocks per year, oblige O.K. to invest more than $370,000 each year to supply inputs to the two-house farm,

plus costs of transportation and medicines. O.K.'s contracts with growers are at-will arrangements, affording O.K. the legal ability to terminate a grower who wastes the assets the grower is given. Respondents conceded that O.K. has never terminated a grower. App. 85a.

Growing arrangements like O.K.'s, and the incentives for cost-effective practices that they give farmers, have proven to be highly efficient. Between 1997 and 2007, the relevant period in this litigation, output of chicken in the whole poultry industry increased by nearly one-third, from 37 billion pounds to 49 billion pounds. O.K.'s own production rose 65%, from 629 million pounds in 1997 to 1.04 billion pounds in 2007. O.K.'s share of the market for chicken sold in the United States jumped from 1.7% to 2.1%, averaging 2%.

As total output of chicken increased from 1997-2007, domestic consumer prices fell in both nominal and inflation-adjusted terms. Growers' expert conceded that domestic chicken prices have declined steadily since 1980 without sacrificing consistency or quality. A comparison between the revenues per pound that O.K. received, and the Wholesale Prices of Whole Chickens published by the Department of Agriculture show that O.K.'s prices lagged that index. At trial, O.K.'s evidence showed that it distributed every chick its hatcheries produced to growers to be raised by them for the consumer market. Respondents conceded that they had no evidence that O.K. had produced below the capacity of its hatcheries or the physical capacity of its owned resources. In addition, they did not dispute that O.K. purchases extra chicks from third parties, when available, to supplement supply from O.K.'s own

hatcheries. Sometimes no extra chicks are available; sometimes up to 200,000 a week can be trucked in from Georgia and South Carolina. Therefore, as was noted at trial, O.K.'s production of chicks is "variable" because the supply of chicks from its own facilities (hatch rate) and from third parties will vary.

O.K.'s principal product is breast meat, which it further processes by breading, cooking, and freezing it into sandwich filets, patties, and tenders for fast food chains, such as Burger King and Wendy's, and also for retailers, such as Wal-Mart.[1] Any breast meat produced in excess of the needs of these customers is sold on the spot market to purchasers who shop for the best prices.

O.K.'s business customers solicit bids from multiple chicken producers. Typically O.K. bids against three to five other companies to earn the right to be a supplier. O.K. is not the sole supplier to any of the companies that buy from it. Its contracts guarantee it no particular volume of sales. Its white meat contracts are fixed-price agreements that last a year.

2. The Proceedings Below. Two months after Russia placed an embargo on American poultry, Respondents brought this case against O.K. on behalf of themselves and a putative class of Oklahoma growers that contract with O.K. They claimed that two of O.K.'s practices restricted their individual production of chicken: the number of chicks distributed in each flock per square foot of housing ("density"); and the days a grower must wait before

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[1] Dark meat and wings are by-products of breast meat production, and are exported, via competitively-bid, fixed-price agreements running 30-45 days in length. Exporters to Russia have been the largest customers for leg quarters.

being restocked ("days out"). Growers claimed that such restrictions constituted "unfair practices" under Section 202(a) of the PSA. In addition, they claimed they lacked the same information about chickens that O.K. had, that their houses were too large for the number of birds they were given, and they were not paid enough for their labors, all of which had some unspecified impact on the total production they could achieve.

On January 28, 2005, the trial court granted summary judgment to O.K. on Respondents' PSA claim because none of the alleged "unfair practices" resulted in any harm to competition. Respondents appealed to the Tenth Circuit contending that Section 202(a) did not oblige them to prove injury to competition.

On July 31, 2007, the Tenth Circuit rejected that argument, holding that claimants under Section 202(a) of the PSA must show competitive harm to prove a violation. Nonetheless, it reversed the grant of summary judgment to O.K. because it concluded that Respondents had raised a triable issue on the question of harm to competition. Noting that O.K. might hold a "monopsony" in eastern Oklahoma, the court held that there was evidence that "when wholesale prices are weak, [O.K.] will delay sending chicks out to growers," a practice that, it concluded, may injure competition in the consumer market. *Been I*, 495 F.3d at 1233; App. 59-60a. The court held that "to demonstrate that a monopsonist has engaged in 'unfair practices' under § 202(a), a seller [Respondents] must show that the buyer's [O.K.'s] practices threaten to injure competition by arbitrarily decreasing prices paid to sellers *with the likely effect*

of increasing resale prices." Id. (emphasis added); App. 59a.

On remand, O.K. met Respondents' complaints about its "density" and "days out" practices, which most directly affected production. With respect to density, the evidence established that while densities had diminished over time, from 1.25 per foot in 1992 to 1.17 per foot in 2007, bird weights had risen substantially. Larger birds need more room, and are set less densely. Respondents are paid by the pound, and their expert conceded that their individual production measured in pounds was not reduced. In fact, his own calculations showed that individual growers supplied 32 pounds per square foot of housing in 1997, and between 36 and 38 pounds per foot in 2007. He conceded that O.K.'s density decisions had had no impact on the company's own aggregate production to the market, and further that he had no evidence that O.K. produced below its hatcheries' capacity or the capacity of its owned resources.

With respect to days out, O.K. attempts to replace flocks within 10-14 days, and on average replaces flocks about two days sooner than other poultry dealers. Time is needed for pathogens from the preceding flock to die before day-old chicks with no developed immune system can be set into that growing environment. The only years when the 10-14 day window was exceeded were 1997 and 2002-03. In 1997, O.K.'s new contract attracted so many additional growers that its hatcheries were unable to supply each with a full flock in 14 days, and farmers had to wait in line 18.97 days to be resupplied. Once new hatcheries came on line in 1998, O.K.'s annual production immediately jumped 20%. Then, in 2002

and 2003, Russia placed an embargo on American chicken, and days out rose to 17 days. Still, in both embargo years, 2002 and 2003, O.K. placed *even more* birds for its growers to raise. Growers, in turn, supplied O.K.'s plants with 147 million birds in both 2002 and 2003, more than the previous-record 143 million that had been delivered for processing in 2001.

At the close of the evidence, the trial court denied O.K.'s motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50. The jury returned a verdict for Respondents and awarded $21,141,975.00 in damages, nearly $7 million more than Respondents' own expert calculated. The district court denied O.K.'s motion for judgment as a matter of law, App. 80a, and denied its motion for a new trial conditioned upon Respondents' acceptance of a remittur reducing damages to $14,511,935.00. App. 86a-90a. Respondents accepted the remittur.

On appeal, O.K. contended that the undisputed evidence precluded any finding of injury to competition. While noting that O.K. held only a 2% market share in the chicken output market, the Tenth Circuit held that testimony from Respondents' expert that O.K.'s practices "impacted immediate resale and national prices" was sufficient to sustain the judgment, 2010 WL 3995981 at *9; App. 20a, conceiving that *Indiana Federation* deems such evidence sufficient for every case brought under the antitrust laws. O.K. also contended on appeal that because it produced at the physical capacity of its owned resources, it could not have used an unfair practice "with respect to live poultry" as the PSA requires. Put another way, even if Respondents owned the hatcheries and could distribute output at

discretion, they themselves could not have grown any more chickens than they did with O.K. making the decision. The Tenth Circuit rejected that argument, holding that evidence of variable production alone was sufficient to sustain the judgment. App. 19-20a. A timely petition for rehearing or rehearing *en banc* was filed, which the Tenth Circuit denied on November 26, 2010. App. 100a.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS

The Court should grant the petition because the decision below conflicts directly with decisions of other circuits. *See* S. Ct. Rule 10(a). As explained below, the upshot of the Tenth Circuit's decision in this case is that the legality of ordinary, internal production decisions made by companies subject to the PSA will turn on where claims are brought and on the business judgments of juries, who will be allowed to second-guess those decisions as long as an expert can express an opinion stating that those decisions affected output prices. Under the Tenth Circuit's holding, this is so even though (1) the defendant lacks any substantial market share and (2) the undisputed market evidence reveals that total output has increased and consumer prices have fallen.[2]

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[2] Market power is the ability to raise prices profitably above the competitive level. *NCAA v. Board of Regents*, 468 U.S. 85, at 109 n. 38 (1984).

The conflict between the judgment below and the Seventh Circuit's holding in *Republic Tobacco, supra,* is clear. There, the court held that vertical distribution agreements were not subject to the truncated competitive effects analysis adopted by this Court in *Indiana Federation*. *Republic Tobacco*'s dicta opened the possibility that in a proper case, market power might be proved against a vertical restraint by "direct evidence of anticompetitive effects," but only if the defendant held a "substantial market share," 381 F.3d, at 737. Otherwise, *Republic Tobacco* said "As horizontal agreements are more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases. To do so might harm competition and frustrate the very goals that antitrust law rules try to achieve." The Eleventh Circuit, in reviewing a horizontal agreement, has referred to such proofs as constituting a "low threshold." *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006). Probably for these reasons *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 309 F.3d 836, 840 (5th Cir. 2002), expressed doubt that *Indiana Federation*'s detrimental effects analysis may be employed in cases challenging vertical restraints. The conflict between the Seventh and Tenth Circuits on this point supports granting certiorari. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

While *Republic Tobacco* arose under Section 1 of the Sherman Act, 15 U.S.C. § 1, and this case arises under the PSA, *Republic Tobacco*'s pertinence is not reduced. Both this Court and the circuit courts have consistently noted that Section 202(a) of the PSA, 7 U.S.C. § 192(a), has its lineage in antitrust law. In

Stafford v. Wallace, 258 U.S. 495 (1922), this Court recognized that the "chief evil" that Section 202 sought to address was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and *arbitrarily to increase the price to the consumer, who buys.*" *Id.* at 514-15 (emphasis added).

Given this statutory aim, Section 202 "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *De Jong Packing Co. v. U.S. Dep't of Agric.*, 618 F.2d 1329 1335 n.7 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); *see also Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged."). Accordingly, every appellate court to consider the issue, including the Tenth Circuit in *Been I*, *supra*, has held that to prove a violation of PSA Section 202(a)'s "unfairness" proscription, plaintiffs must prove injury to competition,[3] incorporating antitrust principles.

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[3] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010), *cert. denied*, 2011 WL 197656 (U.S. Jan. 24, 2011); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4-5 (4th Cir. Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong*, 618 F.2d at 1336-37; *Pac. Trading Co. v. Wilson & Co.*,

The unusual treatment the Tenth Circuit gave to a vertical restraint is starkly at odds with consensus thinking. In *Sylvania,* this Court expressly recognized that vertical arrangements have substantial potential for stimulating competition, 433 U.S. at 51, and therefore that any categorical proscription of vertical nonprice agreements was inappropriate. *Id.* at 47-59. Since that time, the Court has been "solicitous to assure that the market-freeing effect of *Sylvania* is not frustrated," *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988), and noted that doctrine in this area should be formulated to protect *Sylvania's* approach. *Id.*

As a result of this principle, circuit courts have consistently held that market power is an "indispensable ingredient" of claims challenging vertical arrangements, *see, e.g., Digital Equip. Co.*, 73 F.3d at 761, insisting that plaintiffs prove such power through market analysis before a court may intervene. *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008). A party has market power when, by restricting its own output, it can restrict market-wide output, and hence increase market-wide prices. IIA Philip Areeda & Donald Turner, *Antitrust Law* ¶ 501, at 322 (1st Ed. 1978). To do so, a party's output must loom so large that restriction of it cannot readily be addressed by increased production from rivals. *L.A.P.D., Inc. v. Gen. Elec. Corp.,* 132 F.3d 402, 405 (7th Cir. 1997) (Easterbrook, J.) Without market power to increase prices above competitive levels, and *sustain* them for an extended period, consumer welfare is not threatened. *Rebel Oil Co. v. Atl. Richfield Co.,*

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547 F.2d 367, 369-70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d 712.

51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). Selling by competitive bid, as O.K. does, negates "power over price," *Nat'l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1024 (8th Cir. 1985) (Arnold, J.). Consequently, absent structural abnormalties, market power is inferred from a predominant share of the market. Yet in no case but this one has a defendant with a 2% share been found able to injure competition with internal protection decisions.

It is easy to understand why the other circuits are hesitant to find injury to competition proceeding from the unilateral production decisions of a party with a small market share. The purpose of antitrust law is to protect consumers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'") (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) ("The antitrust laws protect consumers, not producers. They favor competition of all kinds, whether or not some other producers think the competition *'fair.'*"). The same is true of the PSA. As this Court has noted, the "chief evil" to which the PSA is directed is a monopoly that permits a party subject to the statute to raise prices to consumers. *See Stafford*, 258 U.S. 514-15. Thus, the same consumer orientation that underlies the Sherman Act permeates the PSA as well.

Respondents disputed neither that the relevant market for analyzing the competitive effects of O.K.'s practices was the market for chicken sold in the United States nor that O.K. had only a 2% share of that market. The other circuits, relying on this Court's holding in *Jefferson Parish*, 466 U.S. at 26-

27, have routinely held that market shares under 30% cannot support a finding of market power "as a matter of law." *See, e.g.*, *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3d Cir. 1998) (20-25% insufficient); *Retina Assocs., P.A. v. S. Baptist Hosp. of Fla., Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1999) (15% share insufficient); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir. 1988) (surveying cases and finding no instance in which market power was found when a defendant had a share of less than 17-25%); *A.I. Root Co. v. Computer/Dynamics, Inc.* 806 F.2d 673, 675 (6th Cir. 1986) (2-4% share insufficient); *Dimmit Agri. Indus. v. CPC Int'l, Inc.* 679 F.2d 516, 530 (5th Cir. 1982) (21% share insufficient), *cert. denied*, 460 U.S. 1082 (1983). Indeed, as Judge Bork has noted, "so impotent to raise prices is a firm with a market share of 5 or 6% that any attempt by it to engage in a monopolistic restriction of output would be little short of suicidal." *Rothery*, 792 F.2d at 217. Because the Tenth Circuit's holding cannot be squared with circuit consensus, the Court should grant review and resolve the conflict.

The Tenth Circuit's invocation of *Indiana Federation* permitted a very deep anomaly to go unresolved: O.K., with a 2% market share, *out-produced* rivals in a *falling* market and was held to have injured the consumer. Such a proposition requires a detailed market analysis, not statistical inference. Instead of treating these facts as triggering a "more sedulous" analytical inquiry, *Cal. Dental Ass'n.*, 526 U.S. at 781, the Tenth Circuit treated the testimony of plaintiffs' expert about allegedly "actual detrimental effects" as raising a question for the jury to decide. *Been II*, 2010 WL 3995981 at *9 (testimony of plaintiffs' expert,

"notwithstanding O.K.'s own evidence of its purported lack of market power, was sufficient in our view both to create a genuine issue of material fact as to whether O.K.'s production practices over time [were] likely to increase consumer prices for [O.K.'s] products in comparison to what prices would have been but for the practice") (internal quotations omitted); App. 19a. That holding conflicts directly with the Third Circuit's conclusion in *Deutscher Tennis Bund* that "[t]he application of the quick look analysis is a question of law to be determined by the court, and therefore the concept of quick look *has no application to jury inquiry.*" 610 F.3d at 833 (emphasis added).

Finally, these conflicts cannot be dismissed as resulting from the application of a specialized regulatory statute to a specific industry designed to deter specific conduct. As this Court has noted in the Sherman Act context, competition policy is not like other forms of regulation. Excessive deterrence resulting from regulation in the food safety area, for example, may well be consistent with the aims of the statute in question. That is not true with competition provisions. *United States v. United States Gypsum Co.*, 442 U.S. 422, 441 n.17 (1979). Conduct that increases output and lowers prices to consumers is treated by competition policy as *beneficial*.

The Tenth Circuit's rule threatens growing arrangements that have proved very efficient. O.K., like many other poultry dealers, operates not just in the Tenth Circuit (Oklahoma) but also in the Eighth (Arkansas). The Tenth Circuit has given growers in Oklahoma an advantage their colleagues in Arkansas do not enjoy, even though both operate under the same contract and conditions. If O.K. must conform

its conduct to varying interpretations of the PSA, then it has no choice but to comply with the most stringent rule. That constitutes precisely the sort of "excessive deterrence" against which this Court has warned and which the other circuits, through implementation of market power screens and appropriate cabining of the quick look analysis derived from *Indiana Federation*, have avoided. This conundrum is intolerable for the efficient operation of an interstate business, particularly in an industry as important as food. The Court should resolve the conflict and establish a uniform policy for this vital industry.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

While the conflicts between the Tenth Circuit's decision and those of other circuits suffice to warrant review, that need is bolstered by conflicts between the Tenth Circuit's decision and controlling authority from this Court. *See* S. Ct. Rule 10(c).

1. The Tenth Circuit proceeded on the assumption that *Indiana Federation* approves actual effects evidence to prove injury to competition in all cases. This Court has narrowly circumscribed its use, saying the industry analysis is not required to prove the anticompetitive effects of *horizontal* agreements, *Cal Dental Ass'n.*, 526 U.S. at 770. A much deeper analysis is required for vertical agreements, and in such cases this Court has never approved a finding of market power where the defendant held a share lower than 30%. *See Jefferson Parish,* 466 U.S. at 26-27; *see also Times-Picayune Publ'g Co. v. United*

States, 345 U.S. 594 (1953). The record below exhibited no "market imperfections" that would support a departure from this rule: the product is fungible; it is sold in expressly competitive circumstances to sophisticated buyers; there are no barriers to competitive entry by other firms whose supply could increase if they chose, like O.K., to run overtime and purchase extra chicks from third parties. There are many substitutes for chicken meat. Demand was not shown to be highly inelastic. In the absence of structural imperfections on the output side, the only possible imperfection on the input side is the lawful monopsony that O.K. holds over part of the area where it purchases its inputs, and this "restraint" was not shown to have diminished its production, where its practice was to distribute every chick its hatcheries generated for ultimate production to the market.

2. The Tenth Circuit thought O.K.'s alleged monopsony was economically significant, and *Been I* issued five predictions: O.K.'s aggregate production would decrease; the number of growers selling to it would decrease; each grower's sales volume would decrease; prices paid growers would decrease; consumer prices would rise. 495 F.3d at 1232; App. 56-57a. Not one came true over the ten-year period surveyed (1997-2007).

Monopsony is the mirror image of monopoly, and similar legal standards apply to both. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007). Monopoly, *simpliciter*, violates no law. *Pac. Bell Tel. Co. v. Linkline Comm'ns, Inc.*, 129 S. Ct. 1109, 1118 (2009). It is not the possession of monopoly power, but the abuse of that power that violates the law. *Olympia Equip. Leasing Co. v.*

Western Union Tel. Co., 797 F.2d 370, 374 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). The PSA condemns an anticompetitive "practice or device," but not status.

The Tenth Circuit has in this case adopted an unsustainable view of what constitutes "anticompetitive practices." *Been I* said that when wholesale prices are weak, O.K. delays sending chicks to growers, 495 F.3d at 1232; App. 59-60a. *Been II* scored O.K. for increasing its production beyond capacity to meet unexpected demand, suggesting by this datum that all other production is "reduced." 2010 WL 3995981 at *8; App. 18a. In each instance, O.K. was responding to demand, not manipulating it. The Tenth Circuit has condemned a monopsonist for purchasing services at its perceived optimal level, conduct that would never be held against even a very large-market monopoly that sold its goods and services at its perceived optimal level, even though that meant buying fewer inputs.

Contrary to the Tenth Circuit's conceptions, O.K. cannot leverage its monopsony into power in the output market. Legal scholars and economists consistently note that where monopsonies sell into a competitive market, price and total output are unaffected. IIB Areeda & Hovenkamp, *Antitrust Law, supra*; Roger Blair & Jeffrey Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 305 (1991) (any monopsony output reduction will not affect market price when the monopsist sells its output in a competitive market). This is true because if the monopsony reduces production "other competitors... expand by an equal amount... market output remains the same because other competitors (purchasing in other input markets) take up the slack." Stephen C.

Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 673 (2005). Professors Areeda and Hovenkamp note that a seller to a monopsony will not decrease output unless its marginal costs increase. XII Areeda & Hovenkamp, *Antitrust Law* ¶ 2011b, at 127 n.8 (2d ed. 2003). In vertically-integrated production, processors bear the marginal costs of increased output: chicks, feed, medicine, and delivery. Considerations such as these caused the *Weyerhaeuser* Court to recognize that monopsonistic practices present less of a direct threat of consumer harm because they can "succeed with little or no effect on consumer price," 549 U.S. at 324. Sometimes input savings can be shared with consumers to increase market share. *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 928 (1st Cir. 1984) (Breyer, J.) (lower premiums), *cert denied*, 471 U.S. 1029 (1985).

Here, it is undisputed that O.K. has only a 2% share of the output market, which is simply too trivial to permit it to raise chicken prices in a national chicken market. *Jefferson Parish*, 466 U.S. at 26-27; *Rothery*, 792 F.2d at 217; *see also* Easterbrook, *supra,* at 20 ("[f]irms that lack power cannot injure competition no matter how hard they try"). Thus, any monopsony power it purportedly exercises in the purchase of growing services in eastern Oklahoma would not translate into supracompetitive prices in the national chicken market because any reduction in O.K.'s output would be offset by other chicken producers. The Tenth Circuit's decision, in short, rests on an economic impossibility.

3. The court below apparently believed that the testimony of plaintiffs' economic expert could compensate for contrary market facts. *Been II*, 2010

WL 3995981 at *9 (stating that plaintiffs' expert's testimony is sufficient to support the judgment in this case notwithstanding undisputed market facts showing that O.K. lacked market power); App. 19a. But, again, this Court has said just the opposite. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), expressly rejects the notion that expert testimony can overcome market facts that demonstrate a lack of injury to competition. In *Brooke Group*, the Court held that the undisputed market facts showing increased output and reduced prices made it unreasonable "to conclude that Brown & Williamson threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market." *Id.* at 242. It then noted that the plaintiff's expert had testified to the contrary:

> To be sure, [plaintiffs'] economic expert explained [plaintiff's] theory of predatory price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole. But this does not alter our analysis. When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Id.

The conflict between *Brooke Group* and this case is stark. Here, the undisputed record facts established that O.K.'s output grew by 65% over the relevant period. Overall chicken output in the United States grew one-third, some 12 billion pounds, and both real

and nominal prices for chicken fell. In addition, it is undisputed that O.K. has but a 2% market share in the market for the sale of chicken in the United States and sells the vast bulk of its products through competitive bidding. Against these objective market facts that suggest a lack – if not impossibility – of any market-wide output restriction producing uncompetitively-high prices, the Tenth Circuit weighed the testimony of plaintiffs' expert and held it sufficient to sustain the judgment "notwithstanding O.K.'s evidence of its purported lack of market power." *Been II*, 2010 WL 3995981 at *9; App. 19a. The Tenth Circuit's decision, therefore, directly contradicts the holding in *Brooke Group*.

This Court has insisted that competition cases must "make economic sense." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) ("all antitrust cases . . . must make economic sense"). "When the factual context renders the claim implausible," then plaintiffs are obligated to adduce "*more persuasive evidence* to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587 (emphasis added). The Court has not retreated from these principles. Indeed, it recently applied them to the pleading stage of antitrust cases, requiring plaintiffs to "state a claim to relief that is plausible on its face" before imposing the cost of discovery on defendants. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Abandoning these principles, however, the Tenth Circuit imposed a relaxed, low-threshold standard in which the testimony of an expert witness and undisputed objective market facts are placed side by

side with a lay jury to pick which version of reality it prefers. *Brooke Group* expressly rejected that approach. Even the trial court recognized the incongruity between the outcome in this case and economic reality. In denying O.K.'s motion for judgment as a matter of law, the trial judge pointedly stated that "[e]ven now [after the conclusion of the trial], this court is uncertain how this case makes economic sense." App. 84-85a. That uncertainty exists because, in fact, the case makes no economic sense. At bottom, the Tenth Circuit has analyzed a case involving the competitive effects of a routine business practice in a manner that this Court has expressly rejected. Such a clear conflict with this Court's decisions warrants review.

III. PARTIES SUING "LIVE POULTRY DEALERS" FOR "UNFAIR PRACTICES" UNDER THE PACKERS AND STOCKYARDS ACT MUST SHOW THAT THE LIVE POULTRY DEALER USED PRACTICES "WITH RESPECT TO LIVE POULTRY" TO RESTRICT THE PRODUCTION OF ACTUAL ANIMALS

Been I noted that O.K., by actively directing its own production, controls how many chicks each grower gets and when. This control permits O.K. to direct how much meat from its facility is produced to the consumer. *Been I* at 1233; App. 57a. At trial, O.K. showed – and Respondents did not dispute – that all chicks hatched at its facilities were distributed for growing. O.K. urged that the PSA's limitation to practices "with respect to live poultry" required Respondents to show that production of actual animals was suppressed. The Tenth Circuit rejected that argument.

A grant of certiorari is appropriate when a statute concerns "the importance of the issue for the agricultural community and for the administration of the antitrust laws." *Nat'l Broiler Mfg. Assn. v. United States,* 436 U.S. 816, 820 (1978). The Tenth Circuit below viewed O.K.'s argument as one of simple sufficiency, and sufficiently answered by the fact that production was perceived to vary. Respondents *conceded* that aggregate production (the only metric of interest to consumers) was unaffected by O.K.'s density practices, and could not dispute that O.K. produced to the physical capacity of its owned resources, only that production varied, and the chicks had to be coming from somewhere. But hatch rates vary and so does the ability to buy extra chicks. Chicks will come from somewhere at non-uniform rates. The Tenth Circuit's disregard of plaintiffs' admissions in analyzing the competitive effects of O.K.'s practices, sever the connection between the statutory language and business realities in agriculture. Animal production will *always* vary. It will vary *significantly* in O.K.'s case depending on how many extra chicks are available for purchase from points as far away as South Carolina and Georgia. Sometimes it can get none, sometimes as many as 200,000 a week. That difference alone will result in a production variance of 8%.[4] The Tenth

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[4] Respondents contend that O.K. can always buy 200,000 extra chicks a week if it will only pay enough for them. That argument is punctured by the observation in *Pickett*, 420 F.3d at 1283, that "[o]f course, in hypotheticals where economic constraints are assumed away, economic problems are not problems – Tyson is an actual business that operates in the real world through real markets where there are real economic limits. Tyson has competitors who stand ready, willing, and able to undercut the price of its product if it pays too much for

Circuit cited O.K.'s president's testimony that the company will increase production to meet unexpected demand as evidence that O.K.'s production at all other times is "reduced," without considering repeated testimony that at other times, not as many live chicks can be purchased. This makes economic sense. If general demand is low, breeder hatcheries will themselves not produce as much stock from which chicks-for-market can be purchased.

Congress amended the PSA in 1987 to afford poultry growers the same payment and statutory trust protections that cattle owners enjoyed. H. Rep. No. 100-397 at 5-16, *reprinted in* 1987 U.S.C.C.A.N. 855-65. It is not the PSA's function to "level the playing field" between farmers and dealers. *IBP*, 187 F.3d at 977. It is most especially not the PSA's function to specify the prices that must be paid in animal markets. *Swift & Co. v. Wallace*, 105 F.2d 848, 853 (7th Cir. 1939). That is, however, precisely what the jury was allowed to do, in deciding that O.K. should have paid growers 4.69¢ per pound in 1998, instead of the 4.3¢ its popular contract offered, a finding that cannot be based on "reduced production," because 1998's production was 20% higher than 1997's, in consequence of an expansion to O.K.'s principal hatchery.

[inputs]." *Seemingly*, all would be well if O.K. had paid it Growers 4.7¢ per pound in 1997. At that level they would enjoy a level of revenue satisfactory to them, but there is no evidence that it would have produced an additional pound of chicken. Yet that was the theory of Respondents' expert and on which the Tenth Circuit rested its judgment. This sort of economic musing divorced from commercial reality led the Eleventh Circuit to state that Respondents' expert, who also testified for the plaintiffs in *Pickett*, was "nuts." *Id.* at 1279 n.7.

The PSA was enacted to regulate livestock "in commerce." *Stafford v. Wallace* contemporaneously interpreted the PSA saying, "the object to be secured by the Act is the free and unburdened flow of livestock" from farm to market. 258 U.S. at 515. If "live poultry" do not exist, there is no "commerce" or "flow" to regulate, and nothing to which the Act's jurisdiction can sensibly attach. O.K. owns hatcheries; those hatcheries can produce so many chicks. That is the only "flow" that the PSA has jurisdiction to regulate.

In view of the evidence of actual capacity production, the trial judge deemed Petitioner's argument "ingenious" but flawed because *Been I*, in his view, held that production by monopsony is inherently reduced. App. 83-84a. Reduced, though, is a relative term. The Tenth Circuit below resisted the commonsense interpretation that would have judged production as being reduced if the defendant failed to produce all the animals that it controlled, reasoning that the PSA is remedial and should be interpreted broadly. 2010 WL 3995981 at * 8; App. 17a. Yet liberal construction of a remedial statute must at some point confront economic reality. Otherwise the statute will stifle the commercial competition that it seeks to foster.

Obliging O.K. to supply a specific number of chicks to each grower, beyond the live poultry it has in its control, would effectively compel it to enter commercial transactions that it considers uneconomic. Alternatively, O.K. would be forced to invest in more hatcheries and plants. But even with extra investment, its "monopsony" would be unchanged,

and O.K. (which can do nothing on its own to alter its status with respect to growers in Oklahoma) would still face trial after trial by growers under monopsony who want more chicks and more feed delivered to them, at no charge, so as to increase their opportunities.

The Tenth Circuit's decision has real-world consequences that transcend this case. Under its ruling, any live poultry dealer that ever produces in excess of its capacity by purchasing extra chicks and running plants overtime to meet unexpected demand, must always continue to do so or risk PSA liability. The rule emerging from the decision penalizes pro-competitive behavior and creates disincentives for live poultry dealers to expand output.

More generally, while the Tenth Circuit did not choose to publish *Been II*, it did publish *Been I*, and the trial judge noted that *Been I* was unclear. App. 92-93a. As the cases shown in footnote 3, *supra*, attest, litigation over poultry growing arrangements under the PSA is escalating. *Been II* will, then, be extensively cited by litigants precisely because it "clarifies" that production at capacity is no defense, that production variations used to meet high demand suffice to prove reduced production at all other times, and that small market shares are no defense, even when one resells in an expressly competitive market. These odd rules arise because a small-market monopsony exists that was presumed to have five anticompetitive effects, not one of which was realized even though operations and effects were scrutinized across ten years. This Court has cautioned against crafting legal rules that authorize a search for a particular type of undesirable circumstance, but end up discouraging legitimate competition. *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp. v. ITT*

Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)). That is precisely what the Tenth Circuit's decision does here. The Court should review it.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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